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Supreme Court, U.S.
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No._____

In the Supreme Court of the United States

OCTOBER TERM, 1992

EUGENE HASENFUS and KASANEE SAWYER,
Petitioners,

v.

RICHARD SECORD and SOUTHERN AIR TRANSPORT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the due process rights of Petitioners, whose plane crashed while on a daytime Iran/Contra resupply flight in Nicaragua after being hit by a hand-held missile, were violated when a directed verdict was entered and affirmed despite substantial evidence that respondents negligently precluded safer night flights.

2. Whether the due process rights of Petitioner Eugene Hasenfus were violated when the Court of Appeals affirmed a holding that his contract with the resupply operation was terminated the day his plane was shot down instead of by the terms of the contract.

LIST OF PARTIES

The parties to the proceedings below were the petitioners Eugene Hasenfus and Kasanee Sawyer and the respondents Richard Secord and Southern Air Transport. Three other parties named in the complaints, plaintiff Sally Hasenfus and defendants Corporate Air Services and Albert Hakim, are not involved in this petition for certiorari.

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Respondents.

PETITION FOR WRIT OF CERTIORARI

The Petitioners, Eugene Hasenfus, Sally Hasenfus, and Kasanee Sawyer, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on June 15, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 962 F.2d 1556, and is reprinted in the appendix hereto, p. __, *infra*. The Eleventh Circuit's denial of a timely petition for rehearing is reprinted in the appendix hereto, p. __, *infra*. The opinion of the United States District Court for the Southern District of Florida in granting, in part, respondents' motion for directed verdict

is unreported but reprinted in the appendix hereto, p. __, *infra*.

JURISDICTION

The jurisdiction of the Southern District of Florida was invoked under 28 U.S.C. § 1332, plaintiffs Eugene and Sally Hasenfus being citizens of Wisconsin, plaintiff Kasanee Sawyer being a citizen of Arkansas, defendant Richard Secord being a citizen of Virginia, defendant Southern Air Transport being a citizen of Florida, defendant Corporate Air Services being a citizen of Pennsylvania, and defendant Albert Hakim being a citizen of California. The amount in controversy exceeded $50,000 in each of the consolidated cases. After a jury trial, judgment was entered for respondents.

On June 15, 1992, the Eleventh Circuit entered a judgment and an opinion affirming the Southern District's orders. *See* 956 F.2d 1556 (11th Cir. 1992). The petitioners then filed a timely petition for rehearing, pursuant to Rule 40 of the Federal Rules of Civil Procedure. On July 24, 1992, the Eleventh Circuit denied the petition without explanation. *See* p. __, *infra*.

The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case arises out of a covert attempt by a joint venture to supply arms and other materials to Contra forces in Nicaragua. The resupply effort was part of what became known as the Iran-Contra Affair. On October 5, 1986, a SAM-7 missile struck a plane flying for the joint venture. Wallace Sawyer died in the crash. His wife, petitioner

Kasanee Sawyer, is the administratrix of his estate. Petitioner Eugene Hasenfus, who was on the airplane that crashed, survived but was imprisoned for three months.

Mr. Sawyer and Mr. Hasenfus started working for the joint venture in February 1986. Mr. Hasenfus was recruited and induced to join the venture by William Cooper and reached an oral agreement with Cooper as to the terms of his contract. [Record, 21-420-70 to 77.] After entering into the oral contract, Cooper had Mr. Hasenfus sign a written contract between himself and a "front" company called Corporate Air Service, Ltd. ("CAS Ltd."). [21-420-83 to 85; 22-421-173.] Mr. Hasenfus testified that Cooper agreed, on behalf of the respondents, that the written contract was a sham and that the oral contract was in force. [21-420-90.] The jury found that both Mr. Cooper and CAS Ltd. were the agents of respondents SAT and Secord. *See* 956 F.2d at 1563.

Mr. Sawyer and Mr. Hasenfus were hired to fly supplies for the joint venture into Nicaragua. Despite requests by pilots, respondents refused to purchase an Inertial Navigational System ("INS") for any of the airplanes, which petitioners assert caused the flights to take place in broad daylight. [*See*, *e.g.*, testimony of Elmo Baker, 25-424-628 to 629; 25-424-652 to 653.] Further, as detailed below, petitioners presented evidence by three witnesses that flying at night was much safer than flying during the daytime. *Ibid*. Participants in the resupply effort were told that there was no money for the INS. In fact, however, over $8 million in Swiss bank accounts was available to the joint venture. [30-429-1530.] Respondent Richard Secord testified that "[i]f the decision had been

made to buy an inertial navigation system, we would have found the money for it." [30-429-1457.]

As the Eleventh Circuit correctly stated, "Around midday on October 5, 1986, . . . Nicaraguan forces shot down a southern resupply flight with a heat-seeking missile. The missile strike killed Cooper, Sawyer, and a Contra aboard the flight. Hasenfus parachuted from the plane and survived, but Nicaraguan forces captured him the following day. Within three months, the Nicaraguan government tried, convicted, and pardoned Hasenfus." 956 F.2d at 1558. The Hasenfuses and Mrs. Sawyer filed separate lawsuits against respondents Southern Air Transport ("SAT") and Secord. The cases were consolidated and tried before a jury on claims of negligence, intentional and negligent misrepresentation, and breach of contract. Two other defendants, Corporate Air Service, Inc. and Albert Hakim, are not involved in this petition for certiorari.

Petitioners claimed at trial that respondents had formed a joint venture to operate the Contra resupply missions. In part, they asserted that although the joint venture had access to millions of dollars, it negligently failed to provide each of the resupply planes with an INS. With an INS, the participants in the resupply mission could have flown at night, which was much safer than daytime flights. Without an INS, night flights were impossible in southern Nicaragua. Mr. Hasenfus further claimed that his written contract did not terminate on the day the missile struck his airplane, because respondents' negligent failure to provide an INS caused the plane to be hit.

The district court directed a verdict on the issue of negligence, holding that "absent in the record is any evidence [that] had the aircraft been equipped with an INS,

the drops in Southern Nicaragua would have been made at night or even flying at night would have been safer." (The district court made its directed verdict rulings before Rule 50 of the Federal Rules of Civil Procedure was amended, eliminating use of the term "directed verdict.") The trial court further limited any contractual damages suffered by Mr. Hasenfus up to the day that his airplane crashed, because at that point he could no longer fly for the joint venture, even though petitioners claimed that respondents' negligence caused the crash and the resulting inability of Mr. Hasenfus to fly for the joint venture. Although the jury found that respondents Secord and SAT formed a joint venture to operate airplane resupply missions in Nicaragua, it awarded no damages to petitioners.

The Eleventh Circuit affirmed the District Court's directed verdicts. *See Hasenfus v. Secord*, 956 F.2d 1556 (11th Cir. 1992). In addressing petitioners' negligence claims, the court first recognized that "[w]itnesses testified that the southern resupply missions could have been flown at night if the planes contained the proper navigation equipment, and that such night flights would have been 'safer' than flying during the day." *Id.* at 1559. Nonetheless, the court held that there was insufficient evidence to submit the negligence claim to the jury. The court concluded that the testimony of petitioners' witnesses, Elmo Baker and James Wilburn, did not support the petitioners' claims. The court's review of the testimony of Baker and Wilburn is examined in detail in the following section of this petition. The court concluded that:

> Viewing [the] evidence in its entirety, we agree with the district court that [petitioners] did not introduce substantial evi-

> dence that the absence of an inertial navigational system proximately caused Sawyer's death. The testimony of Baker and Wilburn raises the possibility that equipping the plane with an INS would have prevented it from being shot down. But Baker and Wilburn's other statements, and the consistent testimony of the other witnesses, showed that equipping the plane with an INS probably would not have reduced the risk posed by surface-to-air missiles.

Id. at 1561. The court did not discuss the testimony of Mr. Hasenfus that it was much safer to fly at night.

With respect to Mr. Hasenfus' contract claim, the court stated that the "district court properly instructed the jury that the contract terminated the day the plane was shot down. While Hasenfus testified that he expected the benefits of his employment to extend beyond that date, he introduced no evidence that [respondents] made such promises." *Id.* at 1562. (In so holding, the court ignored substantial evidence of just such a promise, as discussed in the following section of this petition.)

On July 1, 1992, Petitioners filed a petition for rehearing in the Eleventh Circuit, pursuant to Rule 40 of the Federal Rules of Appellate Procedure. That petition was timely, because it was filed within 21 days of the entry of judgment. *See* 11th Cir. R. 40-2. Petitioners raised two issues in the petition for rehearing: 1) whether the district court erred in directing a verdict on Petitioners' claim that Respondents acted negligently by failing to provide an inertial navigational system; and 2) whether the district court erred by instructing the jury as a matter of law that

Mr. Hasenfus's contract terminated the day he was shot down. The court denied the petition for rehearing without explanation.

REASONS FOR GRANTING THE WRIT

I.

In holding that petitioners presented insufficient evidence of negligence, the Eleventh Circuit ignored and misstated evidence presented by petitioner, and improperly weighed petitioners' evidence against the evidence presented by respondents.

In reviewing the evidence of negligence, the Eleventh Circuit violated petitioners' due process rights, and sanctioned a departure by the trial court from the accepted and usual course of judicial proceedings. As demonstrated below, the petitioners were treated unfairly when the courts below refused to allow the jury to resolve disputed issues of material fact. To let the Eleventh Circuit's decision stand would undermine the integrity and fairness of the judicial system.

As discussed more fully below, the court of appeals made the following blatant errors in holding that respondents did not act negligently by failing to equip the plane with an INS:

1. The Eleventh Circuit erroneously concluded that "the most proximate cause" of the plane being hit was the need to fly low in order to hit the drop zones. 962 F.2d at 1560. The court cited testimony by Elmo Baker that the danger to airplanes at a height of 500 to 800 feet was the same at night as during the day. *Id.* at 1560 n.2. That

testimony is not relevant, however, because the plane was not low at the time it was hit. In fact, the plane was "very high," at least 3,000 feet when it was hit. No one, not even respondents, ever contended that the plane was flying at 500 to 800 feet when it was hit. Thus, as a matter of law, the proximate cause of the airplane crash could not have been the need to fly low while in the drop zone. Thus, the opinion is both factually and legally incorrect.

2. The court incorrectly characterized the testimony of James Wilburn by stating that he testified at one point that the "risk of a successful missile attack was the same day or night." *Id.* at 1561. As set forth below, Mr. Wilburn testified that the *missile* does not know the difference between day or night, but that the person firing the hand-held missile had much more difficulty finding the plane at night. In short, Mr. Wilburn never testified that flying at night was as dangerous as during the day; instead, he consistently testified that night flights were much safer.

3. The Eleventh Circuit failed to even mention the testimony of Mr. Hasenfus that it was "much more dangerous" to fly during the day than at night.

4. The Eleventh Circuit wrongly weighed the evidence in stating that the "majority of the testimony at trial held that safety and accuracy considerations militated in favor of daytime resupply flights in Southern Nicaragua." *Id.* at 1560. A reasonable jury could have believed the testimony of Baker, Wilburn, and Hasenfus that night flights were much safer, and discredited the testimony of two witnesses who provided the alleged "majority" testimony that daytime flights were favored.

A. In concluding that the "most proximate cause of Sawyer's death was the need to fly low," the Eleventh Circuit ignored uncontradicted evidence that the plane was not flying low when its was struck by the SAM-7 missile.

The Eleventh Circuit wrongly discounted the testimony of Elmo Baker. The court first acknowledged that Baker "testified that he would have flown the missions at night if appellees had equipped his plane with an inertial navigation system." 962 F.2d at 1560. The court, however, then noted that Baker also "stated that the risk of anti-aircraft missile fire at low altitudes was the same whether the missions were flown during the day or at night." *Ibid.* In support of that statement, the court cited to the following testimony by Baker:

> Q. Now, am I correct that to make these drops that we've been discussing in Nicaragua, for the equipment to land in a reasonable proximity to the drop zone, the plane would have to come down to perhaps 5 to 800 feet?
>
> A. Yes, that's correct.
>
> Q. And would that expose the plane to ground fire from anti-aircraft guns, missiles?
>
> Q. And at 5 to 800 feet, if there were Sandinista troops in the area, it wouldn't make much difference whether it was nighttime or daytime. Would it?

A. Not at that altitude.

Id. at 1560 n.2. Based on that evidence, the court stated the following:

> Thus, [petitioners'] witness established that the absence of an INS and the need to fly during the day did not proximately cause Sawyer's death. Rather, the most proximate cause of Sawyer's death was the need to fly low in order to hit the drop zones, thereby exposing the aircraft to missile fire. According to [petitioners'] witness, the risk of such fire at low altitudes was the same, day or night. Thus, the absence of night navigation equipment had no impact on the relevant risk.

962 F.2d at 1560.

The court erred in concluding that the "relevant risk" was the risk of flying at 500 to 800 feet. Uncontradicted testimony demonstrates that the airplane was far above that height when it was hit by the missile. Mr. Hasenfus, the only witness to testify on that issue, stated the following: "I don't know if we were descending that much. It appeared to me that I was -- we were quite high. I don't know our exact height." [22-421-187.] One of the attorneys for respondents then elicited more specific testimony from Mr. Hasenfus about the height of the plane when it was struck:

> Q. And by this time, as you were getting ready to drop, you were about 1,800 feet off the ground. Weren't you?

A. I disagree with that. We were more like 3,000 feet.

Q. You certainly were under the clouds. Weren't you?

A. We were neither above them nor underneath them. We were flying in and out of the clouds.

[22-421-191.] Thus, the uncontradicted testimony is that the plane was at 3,000 feet and not at a low altitude of 500 to 800 feet. Even respondents' lawyer contended that the plane was at 1,800 feet, which is far above the height at which Mr. Baker stated the risk was the same at day or night.

Based on the foregoing testimony, the Eleventh Circuit erred in holding that the "absence of night navigation equipment had no impact on the relevant risk." 962 F.2d at 1560. The court based that conclusion solely on Baker's testimony that the risk was the same when flying between 500 and 800 feet. There is no evidence, however, that the plane had dived down to that level to drop the supplies. Instead, the only relevant testimony is that the plane was flying at 3,000 feet when it was struck. Therefore, the court erred in holding that the most proximate cause of the plane crash was the need to fly low in order to drop the supplies.

B. The Eleventh Circuit distorted the testimony of James Wilburn, who stated that a hand-held missile cannot tell night from day but that the person firing the missile has far more difficulty finding the plane during the night than in daylight.

The Eleventh Circuit also misconstrued the testimony of James Wilburn. The court stated that Wilburn "testified specifically that the plane was an easier target for surface-to-air missiles during the day. At another point in his testimony, however, Wilburn stated that the risk of a successful missile attack was the same, day or night." 962 F.2d at 1560-1561 (footnotes omitted). In support of the latter assertion, the court quoted the following portion of Mr. Wilburn's testimony:

> Q. Mr. Wilburn, would the risk of a successful attack by a surface-to-air missile be different whether you're going in the daytime or the nighttime?
>
> A. The attack by the missile itself, no sir.

Id. at 1561 n.4. When placed in context, however, Mr. Wilburn's testimony does not support the court's conclusion but instead stands for the obvious proposition that the missile itself did not know whether it was day or night. Mr. Wilburn made that point clear in testimony that he gave before the question-and-answer quoted by the Eleventh Circuit panel:

> Q. And did you also tell me that this risk was not much different whether you flew in the daytime or the night?
>
> A. Well, from the -- the missile itself cannot distinguish day from night. Technically, there's no difference to the missile, day or night. The difference is to the operator, to the man who is going to shoot it. At night he can't see; so under the cover of darkness, you can hide. In the daytime the operator can see, and vision is man's most important sense. I think we talked about that last night. The missile itself technically is not sensitive to day or night. It's a heat seeker. And there's no real difference, day and night, to the missile itself from a technical aspect.

[24-423-545 to 546.]

By ignoring the foregoing testimony, the court erroneously concluded that "Wilburn stated that the risk of a successful missile attack was the same, day and night." 962 F.2d at 1561. The question-and-answer quoted by the court, id. at 1561 n.4, simply established the obvious point that a missile cannot distinguish day from night. After providing the testimony quoted by the court, Mr. Wilburn once again emphasized that night flights were safer: "You can still see further in the daytime than you can see at night, and this poor soul that's carrying this missile around on his shoulder can see you a lot further in the daytime than he can see you at night." [24-423-567.]

Thus, Wilburn was adamant in his testimony that it was safer to fly at night. The court's assertion to the

contrary is based on a distortion of the record that should not be countenanced. If the public is to have any faith in our judicial system, courts must not engage in the type of selective quotation used by the Eleventh Circuit. Even if there were some ambiguity in Wilburn's testimony, which there is not, it would be the jury's task to resolve the ambiguity. As this Court has stated, "in considering a motion for a directed verdict, the court does not weigh the evidence, but draws all factual inferences in favor of the nonmoving party." L*ytle v. Household Mfg., Inc.*, 494 U.S. 545, __ (1990).

C. The Eleventh Circuit failed to address the testimony of Eugene Hasenfus, who stated that it was much more dangerous to fly during the daytime than at night.

The Eleventh Circuit overlooked the testimony of Eugene Hasenfus in concluding that "[o]nly one witness, Wilburn, testified specifically that the plane was an easier target for surface-to-air missiles during the day" 962 F.2d at 1560 (footnote omitted). Mr. Hasenfus testified that "it was much more dangerous to fly during the day." [21-420-97.] Later in his testimony, Mr. Hasenfus explained that the SAM missile that struck the plane is a "heat-seeking missile. It has an electrical device on there. When it's turned on -- a person has to see this aircraft. When he holds the sites up on it, the sites will come together when it locks in; and at this time, he can ignite this missile, and it'll follow to its target." [22-421-177.] One of the attorneys for Respondents then attempted to get Mr. Hasenfus to admit that a SAM missile was equally effective at night because of a plane's flame signature, but Mr. Hasenfus did

not agree: "I believe he'd have an awful hard time hitting it. I really do. I don't think it'd lock in on it at all." [22-421-179.] The court's failure to even discuss that testimony, which was fully set forth in petitioners' briefs before that court, is impossible to understand.

D. The Eleventh Circuit improperly weighed the evidence in affirming the directed verdict.

Finally, the directed verdict is not justified by the Eleventh Circuit's conclusion that the "majority of the testimony at trial held that safety and accuracy considerations militated in favor of flying daytime resupply flights in Southern Nicaragua." 962 F.2d at 1560. First, the court's reference to the "majority of the testimony" is hard to decipher, because only two witnesses testified to that effect for respondents, while three witnesses--Baker, Wilburn, and Hasenfus--testified to the contrary.

Second, the issue is not what the "majority" of testimony was. The fact that two witnesses testified at length for respondents does not mean that their testimony somehow outweighs the testimony of petitioners' witnesses as a matter of law. A reasonable jury could discredit the testimony of respondents' witnesses and believe petitioners' witnesses, even if the trial court or the Eleventh Circuit might disagree with that assessment. Thus, the jury must assess any argument by respondents that day flights were as safe as night flights, or that other factors required day flights.

As a result, the Eleventh Circuit's opinion flies in the face of the law concerning directed verdicts. In weighing the evidence, the Eleventh Circuit erroneously construed the evidence in the light most favorable to respon-

dents, rather than petitioners. In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), this Court noted the following principles concerning directed verdict motions:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor . . . Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court my not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.

The Eleventh Circuit has recognized in other cases that it must adhere to those principles. In *Therrell v. Georgia Marble Holdings Corp.*, 960 F.2d 1555, 1565 (11th Cir. 1992), the court stated:

> [W]e review the district court's grant of the directed verdict under the normal standard: Viewing the evidence "in the light and with all reasonable inferences most favorable to the party opposed to the motion[,] [i]f the facts and inferences points so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motion . . . is proper." *Buckley v.*

Hospital Corp. of America, Inc., 758 F. 2d 1525, 1527 (11th Cir. 1985) (quoting *Boeing v. Shipman*, 411 F. 2d 365, 374 (5th Cir. 1969) (en banc)).

Contrary to those principles, the Eleventh Circuit in this action misconstrued the testimony of Elmo Baker and James Wilburn, ignored the testimony of Eugene Hasenfus, and weighed the evidence presented by petitioners and respondents. As a result, the Court invaded the province of the jury and incorrectly affirmed the directed verdict. In reversing a directed verdict, the *Therrell* panel of the Eleventh Circuit stated that "[a]lthough it appears that Dr. McCarl [lost] credibility with the court, such loss of credibility is not a justification for issuing a directed verdict. '[I]t is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of the witnesses.'" *Therrell*, 960 F.2d at 1567. The panel in this case failed to follow that settled law. As a result, its opinion is in conflict with *Therrell* and numerous other cases concerning directed verdicts.

II.

In holding that Mr. Hasenfus introduced no evidence that respondents promised to pay him benefits after the plane was shot down, the Eleventh Circuit ignored the jury's finding that William Cooper was respondents' agent, and overlooked evidence that Cooper promised that respondents would pay such benefits.

In reviewing Mr. Hasenfus' contract claim, the Eleventh Circuit violated his due process rights and sanc-

tioned a departure by the trial court from the accepted and usual course of judicial proceedings, by ignoring important testimony. Mr. Hasenfus appealed the district court's ruling that the jury could only award him damages for breach of contract up until October 5, 1986, the day he was shot down. Because Mr. Hasenfus did not claim any contractual damages prior to that date, that ruling made his contractual claim moot. The Eleventh Circuit stated that such an instruction was correct, however, because "[w]hile Hasenfus testified that he expected the benefits of his employment to extend beyond that date, he introduced no evidence that [respondents] made such promises." 962 F.2d at 1562. That conclusion overlooks two facts: 1) the jury found that William Cooper was the Respondents' agent; and 2) Mr. Hasenfus testified that Cooper made those promises to him as part of his contract, whether written or oral. Therefore, there is substantial evidence that Respondents made such promises, and the Eleventh Circuit's bald conclusion to the contrary is impossible to understand.

At one point in the opinion, the Eleventh Circuit acknowledged "the jury's finding that Cooper and CAS were [respondents'] agents." *Id.* at 1563. Further, Hasenfus testified that he and Cooper "had a small discussion on employment through the time William Cooper met me at the airport until [we retired for the evening]." [21-420-77.] Hasenfus then testified that he accepted employment on the following conditions: "The terms were based at a base salary of $3000.00 a month and that all insurance and death benefits and, if there would be cause for--if anything would happen, all endeavors would be taken care of." *Ibid.* Hasenfus further clarified that although his written contract did not include all of the terms of his agreement, the oral contract included all of "the terms described with William

Cooper." [21-420-90 to 91.] Hasenfus also testified that he attempted to get the expenses paid and that he never received any notification of termination of employment. [21-420-139 to 140.] Thus, there is substantial evidence that respondents, through Cooper, promised Hasenfus that he would be compensated for expenses incurred after the plane was shot down, either through his written contract or the oral agreements.

The petition should be granted as to this issue, as well as the negligence issue, because both issues rest on a common error. As discussed above, there is substantial evidence from which a jury could conclude that respondents negligently caused the plane to be shot down. If the jury reached that conclusion, then the doctrines of impossibility and frustration would not result in the termination of the contract -- whether written or oral -- on the day the plane was struck. *Equitrac Corp. v. Kenny, Nachwalter & Seymour, P.A.*, 493 So. 2d 548, 548 (Fla. 3d DCA 1986) (per curiam) (contract is terminated under doctrines of impossibility and frustration only when "the purpose for which the subject contract was formed became entirely frustrated. . . due to no fault of either party"). Thus, since the contract could no longer be performed because of Respondents' negligence, the "measure of damages for the breach of a contract to furnish services is the amount of profit the non-breaching party would have earned during the remainder of the term of the contract had there been no breach." *Physicians Reference Laboratory, Inc. v. Daniel Seckinger, M.D. & Associates*, 501 So. 2d 107, 108 (Fla. 3d DCA 1987).

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted. The Eleventh Circuit's opinion demonstrates a disdain for the due process rights of petitioners. That court misstated some testimony and utterly ignored crucial testimony presented by petitioners. The Eleventh Circuit's conduct was so egregious as to constitute a drastic departure from the accepted and usual course of judicial proceedings, and to violate petitioners' due process rights to a fair hearing. Therefore, this petition should be granted.

Respectfully submitted,

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